No. 82-914

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY, PETITIONER,

v.

SPRAY-RITE SERVICE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether evidence that some distributors of a product complained to the manufacturer about the pricing activities of another distributor, coupled with the manufacturer's subsequent termination of that distributor, is sufficient to permit an inference that the termination was the result of concerted action between the complaining distributors and the manufacturer, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether non-price vertical restrictions can be deemed per se violations of Section 1 of the Sherman Act merely because they are alleged to be part of a resale price maintenance scheme, precluding inquiry into the competitive effect of those restrictions.

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INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Sherman Act is construed in a manner that advances the Act's objective of protecting the Nation's competitive economic system.

STATEMENT

1. Petitioner Monsanto Company (Monsanto) manufactures chemical products, including agricultural herbicides. Between 1957 and 1968, respondent Spray-Rite Service Corporation (Spray-Rite) bought herbicides from Monsanto (and other manufacturers) and resold them to retail dealers and farmers in northern Illinois and adjacent areas (Pet. App. A-2; Pltff. Exh. 201; Tr. 95, 594).[1] This lawsuit arises out of Monsanto's refusal

[1] "Tr." refers to the trial transcript.

to renew its distribution agreement with Spray-Rite in 1968 (Pet. App. A-3).

During the period at issue, Monsanto sold its herbicides primarily through a network of about 100 independent wholesale distributors, including Spray-Rite (*id.* at A-2 to A-3). While Monsanto assigned each distributor a geographic area of primary responsibility, the distributors could sell outside their areas, and the areas of responsibility overlapped; for example, 25 Monsanto distributors had primary areas that overlapped with Spray-Rite's (see *id.* at A-2; Tr. 1519-1525).[2]

Corn is a major cash crop, and Monsanto and other firms produced various corn herbicides to improve crop yields (Tr. 3217-3222). By the late 1960's, Monsanto's corn herbicide sales accounted for 15% of that market, while its chief competitor, Geigy, "dominated that market" with a 70% share (Tr. 2881, 3303-3305; Deft Exh. 502). Monsanto was dissatisfied with this situation and determined to improve its efforts to educate retail dealers and farmers about the technical advantages of its products (Tr. 3236-3245). Accordingly, in 1967 Monsanto informed its distributors, including Spray-Rite, that henceforth it would appoint them only for one-year terms and reappoint them based on compliance with six criteria, including: (1) whether the distributor's primary activity was soliciting sales to retail herbicide dealers; (2) whether the distributor employed trained sales personnel capable of implementing Monsanto's new customer education programs; and (3) whether the distributor was fully exploiting the herbicide market in its area of primary responsibility (Pet. App. A-3; Pltff. Exh. 194). After Monsanto's market position deteriorated even further in 1968—its herbicide sales were

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[2] Monsanto also owned and operated a chain of retail chemical stores and employed numerous salesmen to sell directly to retail dealers (Tr. 1519-1525).

down 30% from 1967 (Tr. 3243)—Monsanto introduced a new herbicide, reduced the distributor price and the suggested retail price of another herbicide, suggested lower distributor profit margins, changed its shipping policies to provide for free delivery only within the distributor's primary area of responsibility, and began to give cash bonuses to distributors who participated in Monsanto's technical schools and product demonstrations or gave technical presentations to farmers concerning Monsanto products (Pet. App. A-3).

In the fall of 1968, Monsanto informed Spray-Rite that its distributorship would not be renewed. At that time, 80% of Spray-Rite's herbicide sales by volume were sales of Geigy products; only 16% were sales of Monsanto products (see Pet. App. A-3; Tr. 936-942).[3] For many years prior to its termination, Spray-Rite was essentially a one-man business operating on a low-margin, high-volume basis (Def't Exh. 465). Over the years, Monsanto had received numerous complaints from its distributors about the low resale prices of other distributors (Tr. 181, 184), including Spray-Rite (Pet. App. A-16). Monsanto, however, had received no such complaints regarding Spray-Rite during the year prior to its decision not to renew Spray-Rite (see Tr. 1379-1403). Subsequent to the termination, Spray-Rite continued to sell herbicides for several years, including Monsanto products purchased from other distributors. It ceased operations in 1972 (Pet. App. A-4).

2. Spray-Rite then sued Monsanto, alleging that the termination eventually had forced it out of business altogether and that Monsanto and its distributors had conspired to implement a resale price maintenance scheme. In particular, Spray-Rite charged that it was

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[3] Even so, Spray-Rite was Monsanto's tenth largest distributor of one herbicide (Pet. App. A-3).

the victim of three separate per se violations of Section 1 of the Sherman Act, 15 U.S.C. 1: (1) an agreement among Spray-Rite's competing distributors and Monsanto that Monsanto would not renew Spray-Rite's distributorship; (2) the institution by Monsanto of various non-price vertical restraints that were in fact designed to fix resale prices; and (3) a post-termination agreement among Monsanto and its distributors to limit Spray-Rite's access to Monsanto products. Monsanto denied engaging in any resale price maintenance scheme and contended that the termination was a unilateral act prompted by Spray-Rite's failure to satisfy Monsanto's announced distributorship criteria.

The case was tried to a jury which, in answering three special interrogatories, found for Spray-Rite on each of its theories of per se violation.[4] The jury assessed damages of $3.5 million, which were trebled by the district court on entry of judgment. See 15 U.S.C. 15.

3. The court of appeals affirmed (Pet. App. A-1 to A-42). First, the court noted that Monsanto had received numerous complaints about Spray-Rite's pricing and subsequently terminated Spray-Rite; the court held that evidence "of termination following competitor complaints is sufficient to support an inference of concerted

[4] The interrogatories read as follows (Pet. App. A-4 to A-5):

1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

action" (*id.* at A-15). Second, the court held that Monsanto's non-price vertical practices—the territorial assignments, distributor education and compensation programs, and product shipping policy—were properly deemed per se unlawful, rather than analyzed under the rule of reason, because they were alleged to be "part of an unlawful scheme to fix prices" (*id.* at A-12). Finally, the court ruled that the jury was properly instructed on Spray-Rite's boycott claim and that there was sufficient evidence to support the jury's verdict thereon (*id.* at A-9 to A-11, A-18).[5]

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of four other courts of appeals on the important question whether a manufacturer's receipt from its distributors of complaints about another distributor's pricing, coupled with the manufacturer's subsequent termination of the latter distributor is sufficient, standing alone, to permit an inference of concerted action under Section 1 of the Sherman Act. Moreover, the court of appeals' ruling that nonprice vertical restrictions can be deemed illegal per se if they are merely alleged to be part of a resale price maintenance scheme is contrary to this Court's holding in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

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[5] Monsanto has not sought certiorari on the boycott issue, see Pet. at 3-4 n.4, and we will not discuss that issue here.

The jury's award of damages did not attribute a particular amount to any of the three alleged antitrust violations, nor was there particularized evidence on that subject; instead, Spray-Rite's expert witness calculated a total damage figure and testified that the termination, Monsanto's various nonprice marketing policies, and the alleged post-termination boycott all contributed to and were the sole causes of Spray-Rite's damages. The court of appeals found no error in this approach (Pet. App. A-18 to A-25).

1. The court of appeals' decision creates a sharp conflict among the circuits concerning the evidentiary showing required to establish the element of concerted action in a Section 1 case. The court below held that a terminated distributor may prove the requisite concert of action simply by showing: a) that the manufacturer received complaints about the plaintiff's pricing from other distributors; and b) that the manufacturer subsequently terminated the plaintiff (Pet. App. A-15 to A-16). As the court acknowledged, however (*id.* at A-15), this holding is directly at odds with the rule followed by the Third Circuit, which has concluded that dealer complaints of this sort are so common and so often devoid of competitive significance that, standing alone, they do not prove that termination was the result of concerted action between the complaining dealers and the manufacturer.[6] The First, Second, and Sixth Circuits also have held that mere complaint and termination evidence is insufficient to prove unlawful concerted action in dealer termination cases.[7] There

[6] *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 115-117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981).

[7] *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856-857 (1st Cir. 1982); *Schwimmer* v. *Sony Corp.*, 677 F.2d 946, 952-953 (2d Cir.), cert. denied, No. 82-277 (Nov. 8, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941-945 (2d Cir. 1981), cert. denied, No. 81-2215 (Oct. 4, 1982); *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982), petition for cert. pending, No. 82-848 (filed Nov. 19, 1982). Two panels of the Eighth Circuit have reached conflicting results on this issue. Compare *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 991-92 (8th Cir. 1982) (concluding that complaint-and-termination evidence is sufficient to prove agreement) with *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982) (concluding that it is not). These cases were recently reargued before the Eighth Circuit sitting en banc; a decision is expected soon. The United States filed a brief as amicus curiae in the en banc proceeding in *Battle*, urging that the *Battle* decision be vacated and the *Roesch* decision affirmed.

thus is a present conflict in the circuits that Justice White aptly has described as "unmistakable."[8]

This issue is fundamental to Section 1 of the Sherman Act. Because Section 1 bars only concerted activities in restraint of trade, a manufacturer's independent decision about the pricing and distribution of his product does not violate Section 1. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Indeed, a manufacturer's freedom unilaterally to regulate the distribution of its product so as to win customers from its rivals is of the very essence of competition. See *Sylvania*, *supra*, 433 U.S. at 56; *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1196 (6th Cir. 1982). To allow proof of concerted action to rest merely on complaint-and-termination evidence, as the court of appeals did here, is to undermine Section 1's crucial distinction between collective and unilateral conduct, because such evidence contributes very little to the identification of collective restraints and the rule below would significantly impede independent, procompetitive conduct.

It often will be in a manufacturer's self-interest to terminate a dealer who violates a distributional restriction or otherwise pursues a sales strategy op-

[8] *Schwimmer* v. *Sony Corp.*, No. 82-277 (Nov. 8, 1982), slip op. 2 n.1 (White, J., dissenting from denial of petition for a writ of certiorari).

The issue is a frequently recurring one. Manufacturers often terminate distributors, a great many terminated distributors easily can portray themselves as pricecutters, and many terminated distributors file antitrust suits against their former suppliers. The question of the type of evidence necessary to prove the existence of an unlawful agreement often will be crucial to the outcome of such cases; indeed, the instant petition is the fourth petition for a writ of certiorari to raise the issue during this Term. See *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, *supra*; *Schwimmer* v. *Sony Corp.*, *supra*; *Venture Technology, Inc.* v. *National Fuel Gas Co.*, 685 F.2d 41, 45-46 (2d Cir.), cert. denied, No. 82-362 (Nov. 8, 1982).

posed to that of the manufacturer. As the Seventh Circuit itself recently observed in *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (1982):

> If a supplier wants his distributor to emphasize nonprice rather than price competition, which * * * is the usual reason why he would restrict his distribution, he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures that he wants them to make on presale services to consumers and on other forms of nonprice competition, and of course the undersold distributors will be equally or more hostile.

Such a coincidence of desires, standing alone, can no more support the inference of conspiracy in a dealer termination case than can evidence only of consciously parallel conduct in a case of alleged horizontal price-fixing.[9] Rather, plaintiffs must submit competent evidence from which the trier of fact could reasonably infer that the supplier and complaining distributors had "a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946).

To infer concerted action (in the absence of direct evidence of collusion)[10] thus requires a showing that the conduct is not in the individual self-interest of the participants, acting independently, and is in their collective

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[9] Compare *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954), with *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U.S. 600 (1914), and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 227 (1939).

[10] Mere communication between a distributor and supplier, such as occurred here, is not in itself sufficient to prove collusion. Nor does such communication involve the danger to competition posed by advance exchange of price information by competitors. Cf. *United States* v. *Container Corp.*, 393 U.S. 333 (1969).

self-interest only when they coordinate their actions.[11] It is "not enough to show that [the complaining distributors], acting separately * * * wanted to get rid of a competitor; there must also be evidence that in terminating [the plaintiff, the supplier] was acceding to their desire rather than acting to promote an independent conception of its self-interest." *Valley Liquors, supra*, 678 F.2d at 744. But at most, the evidence deemed sufficient here by the Seventh Circuit is probative only of the existence of parallel desires on the part of Monsanto and some of its distributors to see Spray-Rite terminated.

Moreover, the standard adopted by the court of appeals would impede the flow of information between a manufacturer and its distributors that is crucial to the operation of efficient distribution systems.[12] Indeed, in practical effect, the Seventh Circuit's rule could virtually immunize dealers from termination once a competitor has complained. Suppliers who maintain good communications with their distributors (and thus hear their complaints) would be rendered powerless to take action against disruptive dealers who threaten the efficient operation of the distribution system, unless the supplier is willing to run the serious risk of incurring treble damages with no opportunity to show the procompeti-

[11] See *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, *supra*, 678 F.2d at 744; *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc. supra*, 637 F.2d at 111, 114; *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

[12] See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, *supra*, 637 F.2d at 111 n.2, citing P. Areeda, *Antitrust Analysis* 560 (2d ed. 1974). Unlike horizontally competing firms, a manufacturer and its distributors must constantly coordinate their activities to assure that their product will reach the consumer in an efficient manner. If the manufacturer cannot rely on its distributors to inform it about the operation of the distribution system, it will have to employ some alternative monitor at additional cost.

tive nature of its actions.[13] That opportunity, of course, is one that *Sylvania* requires the courts to preserve. Treating vertical communications as inherently suspect and indiscriminately imposing antitrust liability based on the receipt of such communications is likely to hinder coordination among the links of the distribution chain, to increase the costs of distribution, and ultimately to raise prices to consumers.[14]

2. The court of appeals also erred in ruling that Spray-Rite's mere *allegation* that Monsanto's non-price marketing policies were part of a resale price maintenance scheme entitled Spray-Rite to reach the jury on the theory that those measures were per se violations of Section 1 (Pet. App. A-11 to A-13).[15] This ruling un-

[13] See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 12-13 (1981).

As the evidence in this case demonstrates, distributors routinely complain to suppliers about the supposed price-cutting activities of competing distributors; Spray-Rite itself made such complaints to Monsanto (Tr. 181). Indeed, the supplier's first information about an infraction frequently will come in the form of complaints by other distributors.

[14] Another adverse consequence of the court of appeals' in terrorem rule concerning the receipt of distributor complaints stems from its open-ended nature: so long as termination follows at some time subsequent to the complaint, the jury may infer concerted conduct. In this case, for example, there was no evidence that Monsanto received any complaints about Spray-Rite during the entire year preceding its termination, see *supra* at 3; yet the court of appeals held that complaints made two to four years previously were sufficient evidence that Monsanto acted, not unilaterally, but in concert with its distributors.

[15] We recognize that respondent may contend that it did more than merely allege a connection between the non-price policies and a price-fixing scheme, namely, that it proved the connection and that the jury so found. But, the court of appeals' analysis, on its stated terms, found the allegation itself to be dispositive (Pet. App. A-13). Thus, the court expressly linked the invocation of a per se approach to respondent's allegations and not to

dermines the distinction made in *Sylvania* between price and non-price vertical restrictions and threatens to stifle many types of procompetitive non-price actions taken by manufacturers in order to stimulate interbrand competition.

a. In *Sylvania*, this Court held that non-price vertical restrictions present sufficient procompetitive potential to be judged under the rule of reason rather than the per se rule. 433 U.S. at 49-50. The Court stated that while vertical restrictions "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," they also "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id.* at 54.[16] Accordingly, the Court concluded that antitrust plaintiffs should be required to prove that non-price vertical restrictions are anticompetitive in the particular circumstances in which they are employed.[17]

Monsanto's territorial assignments for distributors, its compensation programs for distributors who participated in Monsanto's customer education programs, and its free delivery of herbicides to locations within the distributor's primary area of responsibility are all non-

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the proof adduced at trial. We believe this statement of the law is incorrect and would be an inappropriate standard for decision in future cases.

[16] As the Court noted, economists stress that manufacturers "have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." 433 U.S. at 56; see R. Bork, *The Antitrust Paradox* 290 (1978).

[17] On remand in *Sylvania* the Ninth Circuit found that the non-price vertical restrictions there were reasonable: "The restraint was likely to promote interbrand competition given the market structure in the television manufacturing industry * * *." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* No. 79-4131 (Sept. 28, 1982), slip op. 4605.

price vertical practices. They are precisely the type of practices identified in *Sylvania* as likely to have procompetitive effects on the interbrand level that might well outweigh possible anticompetitive effects on the intrabrand level. See 433 U.S. at 54-55.[18] It is also clear that after the implementation of these new marketing policies, Monsanto significantly increased its share of the corn herbicide market (from 15 to 28%) at the expense of the dominant manufacturer, Geigy (whose market share fell from 70 to 55% during the same four-year period) (Def't Exh. 502). Finally, Spray-Rite conceded at trial that it had not attempted to prove that the vertical restrictions violated Section 1 when analyzed under the rule of reason. In these circumstances, the court of appeals' transmutation of Monsanto's non-price marketing policies into per se violations solely on the basis of an allegation that they were part of a price fixing scheme effectively negates *Sylvania*'s careful distinction between price and non-price vertical restrictions.[19]

The practical effect of the court of appeals' decision would be to permit antitrust plaintiffs to avoid the evidentiary requirements of rule of reason analysis with respect to almost all types of non-price vertical restric-

[18] "Established manufacturers can use [non-price vertical restrictions] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." 433 U.S. at 55.

[19] The court of appeals concluded that *Sylvania* was not controlling (Pet. App. A-12); instead, the court relied (*ibid.*) on *United States* v. *Sealy, Inc*, 388 U.S. 350 (1967). *Sealy*, however, involved horizontal restraints, as this Court expressly stated. 388 U.S. at 352. The decision in *Sealy* correctly recognizes that a distinction exists between horizontal and vertical cases, with a different standard for determining liability applicable to each. *Id.* at 354. There was no evidence that Monsanto adopted these programs as the result of collusion among its distributors.

tions, for it is easy to allege that manufacturer-initiated measures taken in order to improve the manufacturer's competitive position on the interbrand level were in fact part of a larger intrabrand price-fixing agreement. While it is certainly possible that such a scheme could exist, the court of appeals' failure to require any credible evidence that it exists in fact threatens to chill the efforts of manufacturers to implement numerous procompetitive vertical marketing decisions that, under *Sylvania*, should be entitled to rule of reason analysis instead of per se condemnation.[20]

b. But there is a more fundamental problem with the court of appeals' reasoning. In *Sylvania*, this Court recognized that too broad an application of the per se rule to vertical restrictions might prohibit practices that may have significant procompetitive effects. 433 U.S. at 51-52, 57-59. Nevertheless, the Court continued to assume a substantive competitive distinction between "non-price" and "price-related" vertical restrictions, applying rule of reason analysis to the former and conclusively presuming the latter to be unlawful. *Id.* at 51 n.18. The court of appeals' decision reveals the difficulties inherent in attempting to categorize vertical restrictions in this manner for purposes of competitive analysis. Accordingly, the Court should grant review in this case to consider whether *all* vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason.

First, as this case shows, in practice it is often difficult, if not impossible, to distinguish between "price" and "non-price" vertical restrictions because both types

[20] In *White Motor Co.* v. *United States*, 372 U.S. 253, 260-264 (1963), this Court required a manufacturer's system of exclusive territories to be evaluated separately for possible anticompetitive effects, even though the plaintiff had proven that the manufacturer was otherwise engaged in price fixing.

of restrictions can have an impact on price.[21] Spray-Rite's theory was that although Monsanto's marketing practices had no direct effect on price, they had the indirect effect of making it economically undesirable for Monsanto distributors to sell to Spray-Rite, thus preventing Spray-Rite from continuing to purchase sufficient quantities of Monsanto herbicides to engage in intrabrand price competition. In the court of appeals' view, this indirect effect on price negated the obvious procompetitive value of Monsanto's non-price marketing innovations. See *supra*, pages 4-5. While non-price arrangements characteristically will have some effect on price, the court of appeals was far too quick to associate any such effect, no matter how attenuated, with a per se violation. After all, this Court recognized in *Sylvania* that a manufacturer's use of non-price vertical restrictions may well have an indirect effect on the level of intrabrand retail prices, see 433 U.S. at 54, yet the Court held that such restrictions must be judged under the rule of reason.

Second, disparate treatment of non-price vertical restraints and resale price maintenance makes little sense from the standpoint of antitrust policy, because resale price maintenance in some situations can have procompetitive or neutral effects. As Professor (now Judge) Posner has explained, resale price maintenance

> is more flexible than exclusive territories as a method of limiting price competition among dealers, and it may be the only feasible method where

[21] For example, *Sylvania* squarely held that it was not per se unlawful for a manufacturer to require its dealers to sell only from a particular location—a "non-price" vertical restriction. 433 U.S. at 38, 57-59. But through "judicious spacing of dealerships the manufacturer with dealerships containing a location clause can limit price competition among its dealers" in order to discourage free riders. See Posner, *supra*, 48 U. Chi. L. Rev. at 11-12.

> effective retail distribution requires that dealers be located close to one another; any free-rider or other arguments that are available to justify exclusive territories are equally available to justify resale price maintenance.[22]

That certainly is not to say that resale price maintenance is always procompetitive on balance, or even that resale price maintenance and non-price vertical distribution arrangements are equivalent in anticompetitive potential. But they are sufficiently similar in their basic competitive characteristics that the rationale of this Court's decision in *Sylvania*—that per se rules should be applied only to practices that are clearly anticompetitive in almost every situation—compels the conclusion that resale price maintenance activities, too, should be analyzed under the rule of reason.[23] This conclusion is further justified by the evident difficulty in practice of defining just what vertical restrictions should be categorized as resale price maintenance in the first place.

Finally, it would now be appropriate for this Court fully to reexamine the legal status of resale price maintenance. The Court has always regarded the rule of reason as the normal test of the unreasonableness of an alleged restraint; per se rules are invoked only where

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[22] Posner, *supra*, 48 U. Chi. L. Rev. at 9. Indeed, the similarities in purpose and effect between resale price maintenance and non-price vertical restrictions led Justice White to observe in his concurring opinion in *Sylvania* that the "effect * * * of the Court's opinion is necessarily to call into question" the per se rule against resale price maintenance. 433 U.S. at 70.

[23] This Court has recognized that resale price maintenance can increase output by inducing dealers to engage in "demand-creating activity" (such as product promotional activities) that may, in certain cases, outweigh the loss of sales that might have been made in the absence of resale price maintenance. *Albrecht v. Herald Co.*, 390 U.S. 145, 151 n.7 (1968). See *Sylvania*, 433 U.S. at 70 (White, J., concurring).

economic and judicial experience has shown that certain practices invariably have a "pernicious effect on competition" *and* lack "any redeeming [competitive] virtue." *Sylvania*, *supra*, 433 U.S. at 49-50; *Northern Pacific Ry* v. *United States*, 356 U.S. 1, 5 (1958). But the Court has never examined that experience with respect to resale price maintenance. Rather, more than 70 years ago the Court simply *assumed*, in *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373, 404-409 (1911), that vertical price fixing is equivalent in all respects to horizontal price fixing and constitutes an unlawful restraint on alienation, and the Court has continued to make that assumption. See, e.g., *Rice* v. *Norman Williams Co.*, No. 80-1012 (July 1, 1982); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980); *Sylvania*, *supra*, 433 U.S. at 51 n.18. See generally Levi, "*The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*," S. Ct. Rev. 250 (1960).[24]

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[24] Justice Holmes dissented from the *Dr. Miles* decision on the ground that resale price maintenance had not been shown to be anticompetitive on balance, see 220 U.S. at 411-413, and (with Justice Brandeis) continued to dissent from decisions presuming resale price maintenance to be unlawful. *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 100 (1920); *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 456-457 (1922). In his dissent in *Dr. Miles*, Justice Holmes urged that the "point of most profitable return[ ] [to the manufacturer] marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The [manufacturer] knows better than we do what will enable it to do the best business." 220 U.S. at 412. More recent observers have expressed the same view. E.g., Bork, *supra*, at 33, 288-290.

The *Dr. Miles* majority's reliance on the Elizabethan law of restraints on alienation has been criticized for decades. See Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 983 (1928); Bork, *supra*, at 284-285. As this Court noted in *Sylvania*: "We quite agree * * * that 'the state of the common law 400 or even 100 years ago is irrelevant to the issue [of] the

Indeed, the received learning about resale price maintenance has been so little questioned because antitrust defendants are highly unlikely to contest a 70 year old per se classification[25] and the Court has had no occasion to reconsider the assumptions made in *Dr. Miles.*[26] The Court should grant review in this case to address the

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effect of the antitrust laws upon vertical * * * restraints in the American economy today.'" 433 U.S. at 53 n.21.

[25] Rather, defendants accused of resale price maintenance generally have argued that there was no agreement to maintain resale prices. See, e.g., *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 36-38 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944).

[26] *Sylvania* did mention possible reasons why resale price maintenance might be treated differently from "non-price" vertical restraints, see 433 U.S. at 51 n.18, but the Court did not rule on that issue or reexamine *Dr. Miles*, and we believe that none of the concerns justifies a continued per se rule. Thus, in *Sylvania* the Court noted the possibility that industrywide resale price maintenance might facilitate cartelization. But that concern could be addressed on a case by case basis, since cartels—whether at the dealer or the manufacturer level—are per se illegal in themselves; it provides no justification for an absolute ban on resale price maintenance in every industry. See Bork, *supra*, at 292-294; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*," 45 U. Chi. L. Rev. 1, 7-8 (1977). The Court also suggested that resale price maintenance might reduce not only intrabrand price competition, but interbrand competition as well. But in cases where a court finds, on balance, that resale price maintenance has anticompetitive effects in both intrabrand and interbrand competition, it might still conclude, under the analysis we propose, that Section 1 has been violated. Finally, *Sylvania* cited Congress' repeal in 1975 of the Miller-Tydings and McGuire Acts, which permitted resale price maintenance at the option of individual states. However, while the 1975 legislation terminated the states' authority to immunize certain conduct from *all* antitrust scrutiny, it did not prescribe the standard for such scrutiny. It remains for this Court to determine, as it has for more than 90 years under the Sherman Act, whether a per se or rule of reason analysis is applicable. See Bork, *supra*, at 288; Posner, *supra*, 45 U. Chi. L. Rev. at 8-9.

question of the competitive analysis to be applied to all forms of vertical restraints, "price" and "non-price" alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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